

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Dean L. Rhoades

Serial No.: 09/802,425

Filed: March 9, 2001

For: **COMPOSITION, APPARATUS AND
METHOD FOR SKIN REJUVENATION**

Examiner: Frank I. Choi

Group Art Unit: 1616

Confirmation No.: 7222

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR RECONSIDERATION

Sir:

The following points are believed to be misapprehended or overlooked in the DECISION ON APPEAL mailed on February 27, 2008 (hereinafter "Decision").

Rejection of Claims 1, 2, 3, 5, 7, 21, 22 and 23 Under 35 U.S.C. § 103 as Obvious over Messenger

In the Decision the Board affirms the rejection of claims 1-3, 5, 7 and 21-23 under 35 U.S.C. §102(e) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over Messenger (see Decision, p. 16, line 10 to p. 18, line 4). These claims are affirmed as standing or falling together because the Appellants did not present separate arguments for any particular claim. However, Appellants believe this is a misapprehension with respect to claims 5 and 7 (claim 7 depends from independent claim 5).

In a previous response, Applicant submitted an Affidavit by Dean Rhodes under 37 CFR §1.131 to overcome the rejection of Messenger (submitted on August 3, 2005 and

March 28, 2006 as Exhibit C along with Exhibits A and B referenced in the Affidavit, herein "the Rhodes Declaration"). The Rhodes Declaration shows claim 5 enjoys an earlier priority date than that of Messenger.

Moreover, in the Decision, the limitations of claim 5, including that the abrasive particles of corundum that are at least 35 percent by weight of the composition, were found not to be new matter (see Decision, p. 18, lines 7-9). Instead, in the Decision, only claims 1-3 and 21-23 suffer the claim 1 limitations "a base comprising at least about twenty-three percent by weight in moisturizer" found not to have been reduced to practice in the Rhodes Declaration (see Decision, p. 17, line 20 through page 18, line 2).

Finally, in the Appellant's Brief, the Appellant argued that the Rhodes Declaration supported claims 5 and 7 (see APPEAL BRIEF, mailed August 3, 2005, herein "Brief", page 20, lines 8-10); that Messenger may be eliminated as prior art to claims 5 and 7 in view of the Rhodes Declaration (see Brief, p. 19, lines 16 through page 20, line 18); and that claims 1-3, 5, 7 and 21-23 are separately patentable over Messenger (see Brief, p. 19, lines 16-18).

Thus, Appellant respectfully asserts that claims 5 and 7 do not stand or fall with claims 1-3 and 21-23 with respect to Messenger because: (1) claims 5 and 7 have been shown to overcome Messenger; (2) claims 5 and 7 are not new matter; (3) a separate argument was tabled in the Brief for claims 5 and 7; and (4) claims 5 and 7 were asserted as separately patentable over Messenger.

As Appellant respectfully submits that the above distinction was overlooked in the Decision, Appellant respectfully requests the Board reverse the Decision with respect to claims 5 and 7 being obvious over or anticipated by Messenger.

Respectfully submitted,

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Dated: 4/15/08

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CERTIFICATE OF TRANSMISSION

I hereby certify that this correspondence is being submitted to the United States Patent and Trademark Office electronically via EFS Web on the date shown below.

12 April
Robert Fiore

4/15/08
Date